Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1764

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

GEORGE WALTON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE WALTON,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered in the above-entitled case on January 29, 1976.

OPINIONS BELOW

The unreported opinion of the Court of Common Pleas of Philadelphia County is set out at pages 9a-26a of petitioner's Appendix. The opinion of the Supreme Court of Pennsylvania, reported as Commonwealth ex rel. Walton v. Aytch, ___ Pa. ___, 352 A.2d 4 (1976) is set out at pages 1a-8a of petitioner's Appendix.

JURISDICTION

The order of the Supreme Court of Pennsylvania was entered on January 29, 1976. A timely petition for reargument was filed and denied on March 5, 1976. This petition for certiorari was filed within 90 days of the order denying reargument. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Where a criminal defendant, through counsel, refuses to move for a mistrial, but effectively precludes the trial judge from pursuing all available alternatives which would have allowed the trial to proceed, should the mistrial be considered to be defense-requested for double jeopardy purposes?

2. Did the Supreme Court of Pennsylvania misconstrue applicable decisions of this Court in holding that the double jeopardy clause bars retrial unless the manifest necessity for the grant of a mistrial is free from doubt?

3. Did the Supreme Court of Pennsylvania disregard applicable decisions of this Court in holding that as a matter of law the defendant's interests have not been considered where the trial judge acts before consulting counsel, and by refusing to consider the mistrial decision in the context of the totality of the surrounding circumstances?

4. Did the Supreme Court of Pennsylvania disregard applicable decisions of this Court in refusing to consider the declaration of the mistrial in relation to the ends of public justice?

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 1764

Louis Aytch, Supt.
Phila. County Prisons,
Petitioner

v.

GEORGE WALTON,
Respondent

ERRATA

At page 4, line 4 of petitioner's statement of the case should read:

$500. Three other adults present at the time were killed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ...[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On February 18, 1974, at 5180 Viola Street in West Philadelphia, four people were murdered. One death was a "contract-killing," the fee being $500. Three other adults present at the time were to insure that there would be no eyewitnesses to the execution. Respondent, George Walton, together with Leroy Brown and James Whitaker were subsequently arrested and charged as being the perpetrators of the crime. Respondent was charged with four counts of murder as of Indictments, Nos. 134-137 of April Sessions, 1974, and one count of conspiracy as of Indictment No. 138 of April

Sessions, 1974. Respondent was brought to trial on November 27, 1974 before the Honorable Stanley L. Kubacki. The first day was consumed with the selection of the jury; twelve jurors and two alternates were selected from two separate panels. In his preliminary remarks to each panel, Judge Kubacki advised the jurors that they would not be sequestered but could return home each evening except for a "remote chance" of spending one night in a hotel during their actual deliberations. The jury was excused for the Thanksgiving weekend without being sworn. (28a, 29a)[1]

The trial was scheduled to resume on December 2, 1974; however, it was continued until December 3, 1974 because of a complication in the Commonwealth's case. The Commonwealth had originally commenced the trial of respondent with the understanding that co-defendant Leroy Brown intended to enter a plea of guilty to all charges and appear as a witness against respondent. Sometime between November 27, 1974, and December 2, 1974, the Commonwealth was suddenly informed that Brown would not

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[1]Page references are to the separately bound appendix filed with the instant petition.

enter a plea of guilty and would assert his Fifth Amendment privileges if called as a witness at respondent's trial. Because of this development, the Commonwealth, on December 2, 1974, went before the Honorable David N. Savitt, sitting as homicide calendar judge,[2] and requested that respondent's trial be continued so that Brown could be tried first. The continuance was denied (30a-48a). During the hearing before Judge Savitt, the First Assistant District Attorney informed the Court that Brown's change of heart occurred because respondent had convinced him not to testify. (55a).

The trial reconvened on December 3, 1974 before Judge Kubacki. At that time, defense counsel brought to the Court's attention, an article which had appeared on December 2, 1974 in the Daily News, a newspaper of general circulation in Philadelphia. The article, which is reproduced in its entirety in petitioner's appendix at 104a,

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[2]Under the practice followed in the Common Pleas Court of Philadelphia, all murder cases are listed in a central "homicide calendar room" and are assigned to a trial judge and courtroom on the day of trial, after the calendar judge ascertains that both sides are ready to proceed. The calendar judge also hears and decides all pretrial matters (except suppression motions.)

contained a general statement concerning Brown's refusal to testify, and stated that this was the reason underlying the Commonwealth's application for a continuance. Defense counsel initially moved for the discharge of the jury, but then withdrew that motion[3] to ask instead that the trial judge give a cautionary instruction regarding the article (56a). After it was ascertained that none of the jurors had read the article, the jury was sworn and trial proceeded (59a).

Later that day, defense counsel brought to the Court's attention a second article which had appeared in the December 3 issue of the Daily News. The article read as follows:

BROWN SILENCED BY WALTON: D.A.

> First Assistant District Attorney Richard A. Sprague yesterday accused mass murder defendant George Walton, 30, of convincing a co-defendant not to testify at Walton's trial.
>
> Sprague told Judge David N. Savitt that Walton spoke to Leroy Brown, 23, of Hazel Avenue near 57th Street, 'during the past week.'

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[3]This would have been tantamount to a motion for mistrial. See Pennsylvania Rule of Criminal Procedure 1118.

Judge Savitt turned down a motion to postpone Walton's murder case to try Brown first. Brown had indicated that he would plead guilty last week but changed his mind and now has decided not to admit guilt nor to testify against Walton.

A tip furnished through the Daily News secret witness program led to Walton's arrest.

Walton and Brown are accused of fatal shootings of four persons inside the home at 4180 (sic) Viola Street March 7th.

Testimony is due to begin today at Walton's trial and Sprague says 'the Commonwealth is substantially impaired in the prosecution of the case.'

Fatally shot were Ruby Holland, 24 of the Viola Street address; Cathy Ferrara, 20, of 578 Barrett Avenue, Haverford; Ronald Hand, 20, of 2704 55th Drive, Bartram Village, and Charles Wallace, 34, of Aspen Street near 38th.[4]

After reading this article, which defense counsel described as "very prejudicial to Walton" (64a), the trial judge decided he must sequester the jury (61a). The panel was then questioned to determine whether the sequestration would

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[4] The facts in the article apparently were obtained by a reporter who was present at the hearing before Judge Savitt on December 2. There has never been any claim that the District Attorney gave the facts to the newspaper or behaved improperly in any way.

constitute a hardship. During the questioning, one juror stated that it would,[5] and she was excused and replaced by the first alternate (63a-64a). At this time the Assistant District Attorney requested that the sequestration order be lifted but the judge refused on grounds that it would be too risky and probably be contested on appeal by the defense (64a). Later in the day, another juror had to be excused and replaced by the remaining alternate (81a).[6] The Assistant

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[5] Her husband and child were sick at home.

[6] This juror was needed to cook and care for aged parents who were ill. When court officers notified them that their son was sequestered and could not return home at night, the mother became "almost hysterical." The juror, of course, was "very, very concerned." (69a). The Assistant District Attorney objected to the dismissal of the last alternate and asked instead that the sequestration order be lifted with cautionary instructions. Alternatively, he requested that this juror be sent home with a court officer to maintain the sequestration. The court refused, ruling:

> THE COURT: I have made my decision. I am going to excuse him because I want him to concentrate on this case. I do not want to separate the jury. The risks are too great in a situation like that.

(79a). The Assistant District Attorney then asked that defense counsel state whether respondent would agree to proceed with eleven jurors if another emergency befell one of the remaining twelve. Counsel refused to state his position at that time.

District Attorney then requested that instead of excusing him, the juror be permitted to return home accompanied by a court officer or other official. (78a). The judge refused this on grounds that under the circumstances the jury should not be separated, and also that he wanted jurors who could concentrate on the case (79a). Thus, at the adjournment of trial on December 3, 1974, the jury consisted of twelve jurors and no alternates.

At 11 p.m. on December 3, 1974, the trial judge received a phone call from a court officer. The court officer informed the judge that one of the remaining jurors had been unsuccessful in acquiring a baby sitter for her children, aged ten and six, who were then alone in their home. (85a-86a). After speaking with the juror, the judge determined that she was "very very distressed" and allowed her to attempt to reach certain neighbors to watch the children. After approximately forty-five minutes of unsuccessful efforts, Judge Kubacki permitted the juror to go home to her children. (87a).

On December 4, 1974, when the trial was to reconvene, the judge related the previous nights events to counsel and informed them that there

were now only eleven jurors remaining. Counsel for the Commonwealth then suggested that defense counsel consent to proceed with eleven jurors pursuant to Pennsylvania Rule of Criminal Procedure 1103; or that the juror who had been allowed to go home the night before be brought in and an extensive colloquy conducted to determine whether she had been exposed to some prejudicial matter which would prevent her being returned to the jury. Judge Kubacki noted that the juror had not been "specifically discharged" (93a). He then inquired whether the juror had returned to court from her home and learned that she had not (95a).

Judge Kubacki listened carefully to the positions of both counsel.[7] The Assistant District Attorney urged that the trial continued by one of the methods outlined above, but defense counsel vehemently opposed both alternatives. He flatly refused to proceed with eleven jurors,[8] and Rule

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[7]The tripartite discussion of alternatives consumed fifteen pages of notes of testimony. (85a-100a).

[8]When questioned by Judge Kubacki, the defendant initially stated that he wanted counsel to speak for him. After consultation with counsel, he was again asked if he chose to proceed with eleven jurors. He answered, "No, sir." (96a-97a).

1103 permits juries of fewer than twelve only if the defendant consents. The court then stated:

> I have no doubt that there was a crisis last night and it was faced. There were extensive and repeated telephone calls made. The Court did speak to [the juror] herself and he was aware of her distress when he spoke to her last night. I think there is no question that the circumstances were extreme last night when the Court made that decision and excused [the juror].
>
> The entire jury panel now knows that an article did appear in the Philadelphia Daily News and if we broke sequestration, I am wondering whether or not their curiosity would be so overwhelming that they might seek out that article. (98a-99a).

Upon being asked to respond, defense counsel stated that he objected to the juror being returned for colloquy as he felt that she was "tainted"; he also feared that she would become angry with him after the extensive questioning he contemplated conducting and would be unable to impartially consider the case. (99a-100a) The trial court then declared a mistrial.

Respondent's counsel subsequently filed a petition for writ of habeas corpus with the Common Pleas Court of Philadelphia County claiming that the retrial of respondent on the instant charges was prohibited by the double jeopardy clause of the Fifth Amendment to the United States Constitution

Hearings on the petition were held before the Honorable David N. Savitt,[9] on January 23 and February 27, 1975. On April 25, 1975, Judge Savitt issued an opinion and an order granting the writ. On April 24, Judge Savitt granted respondent's oral motion for dismissal of all charges. On that same date, Judge Savitt granted a supersedeas so that the Commonwealth could appeal.

The Commonwealth duly appealed to the Supreme Court of Pennsylvania, which on January 29, 1976, issued an opinion and order affirming the grant of the writ. Commonwealth ex rel. Walton v. Aytch, ___ Pa. ___, 352 A.2d 4 (1976).[10] The Commonwealth's petition for reargument was denied by that court on March 5, 1976.

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[9] It should be noted that the homicide calendar judge, rather than the trial judge decided the double jeopardy issue in the Court of Common Pleas. The trial judge had no opportunity to issue an opinion or make factual findings. Moreover, Judge Savitt based his decision on the record before Judge Kubacki without taking any additional evidence. Thus, this Court may freely review the facts found by the lower courts, as well as their conclusions of law.

[10] One Justice concurred in the result and two Justices filed a dissenting opinion.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In holding that the double jeopardy clause bars reprosecution in this case[11], the Supreme Court of Pennsylvania has misconstrued, misapplied, or disregarded numerous guidelines set forth in decisions of this Court. This Court has consistently "abjure[d] the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." Illinois v. Somerville, 410 U.S. 458, 462 (1973). Nonetheless, in the years between United States v. Perez, 9 Wheat. 579 (1824), and United States v. Dinitz, ___U.S.___, 96 S.Ct. 1075 (1976), several clear principles have emerged.

11/ In ruling on the case, the Supreme Court of Pennsylvania has based its decision squarely on the double jeopardy clause of the United States Constitution, as applied to the States through the Fourteenth Amendment, Benton v. Maryland, 395 U.S. 784 (1969), and the decisions of this Court and other federal courts. In Pennsylvania, there is no state basis for respondent's jeopardy claim. The double jeopardy clause of the Pennsylvania Constitution (Art. 1 Sec. 10) has been interpreted to apply to capital cases only. Commonwealth v. Baker, 413 Pa. 105, 196 A.2d 382 (1964); Commonwealth v. Richbourg, 442 Pa. 147, 275 A.2d 345 (1971). Although respondent was charged with first degree murder, when the instant indictments were brought this was not a capital case under Pennsylvania law because the death penalty could not be imposed. Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972); Commonwealth v. Segers, 460 Pa. 149, 331 A.2d 462 (1975).

First, where the mistrial is declared at the defendant's request, the manifest necessity standard is inapplicable, for in that situation[12/] there can be no double jeopardy. United States v. Dinitz, supra. Second, where the manifest necessity standard is applicable, "[t]he broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this Court." Illinois v. Somerville, supra at 462. In considering the exercise of this discretion, the reviewing court must take "all circumstances into account" and not focus on one event or the wisdom of one act out of context. Wade v. Hunter, 336 U.S. 684, 691 (1949). Finally, the ultimate question in determining the existence of manifest necessity is whether the declaration of the mistrial was dictated by "the ends of public justice . . ." United States v. Perez, supra at 580, "or, more precisely, 'the public's interest in fair trials designed to end in just judgments,' Wade v. Hunter, supra at 689 . . ." Illinois v. Somerville, supra at 463. In reviewing the instant case, the Supreme Court of Pennsylvania ignored the above-cited principles, and held that the state is barred from trying a man charged with the execution murder of four persons. Because of that court's disregard of decisions

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12/ absent prosecutorial or judicial overreaching designed to prompt a motion for a mistrial.

of this Court, the sensitivity of the Constitutional provision involved[13/], and the importance to the Commonwealth of the prosecution of a crime of this seriousness, a writ of certiorari is sough

I. IN CONSTRUING THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, THE SUPREME COURT OF PENNSYLVANIA ERRONEOUSLY APPLIED THE MANIFEST NECESSITY TEST TO A MISTRIAL DECLARED BECAUSE OF THE DEFENDANT'S VEHEMENT REJECTION OF ALTERNATIVES WHICH WOULD HAVE ALLOWED THE TRIAL TO PROCEED.

This Court held in United States v. Dinitz, supra, that the manifest necessity standard is inapplicable where the defendant has moved for a mistrial, for in that situation there can be no double jeopardy. It matters not whether he faced a "Hobson's choice", because, "The important consideration,for purposes of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed . . ." Id. at ____, 96 S.Ct. at 1081. While the respondent, through his counsel, refused to move for a mistrial, a reading of the trial record leads to the inescapable conclusion that he, in fact, retained "primary control over the course to be followed." After the sequestration

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13/ Because the double jeopardy bar provides such an extreme sanction, justice requires that the doctrine be carefully defined and consistently and circumspectly applied. Otherwise, trial courts might well become "unduly hesitant conscientiously to exercise their most sensitive judgment . . ." Gori v. United States, 367 U.S. 364, 369-370 (1961).

order was imposed, and the number of jurors began to diminish, the court and counsel had several conferences during which they discussed alternatives should the jury be reduced below twelve. Defense counsel repeatedly refused to state what course he would follow in that event.

On the morning of December 4, the trial judge told counsel that he had allowed the twelfth juror to return home, but had not discharged her. He listened receptively to the suggestions of both counsel. When the Assistant District Attorney requested that the juror might be returned to service, defense counsel vehemently objected, insisting that her partiality would be seriously impaired. He also refused to proceed with eleven jurors, a procedure only available if he approved. While asserting that he would not move for a mistrial, he urged the court to declare that a mistrial had already occurred. He was unquestionably, at that point, in full control of the proceedings.

In these circumstances the law can give no talismanic effect to counsel's refusal to make the formal motion. By closing off all means by which the trial could proceed, defense counsel moved the mistrial as surely as if he had uttered the ritual phrase.

To state that his refusal to proceed with eleven jurors is irrelevant because he had no obligation to do

so, as did the Pennsylvania Supreme Court[14/], begs the question. The proper inquiry is not whether he had a duty to proceed, but whether he retained the choice. That court apparently confused the instant argument with the doctrine of waiver, wherein by a breach of his duty to timely preserve an issue a party loses his right to appellate review. Dinitz made clear that waiver concepts have nothing to do with the choice-of-mistrial issue, which goes instead to the heart and purpose of the double jeopardy clause.

Since respondent was in control of the mistrial decision, double jeopardy should not bar retrial.

II. THE SUPREME COURT OF PENNSYLVANIA MISCONSTRUED OR ENTIRELY DISREGARDED APPLICABLE DECISIONS OF THIS COURT IN ITS INTERPRETATION OF THE MANIFEST NECESSITY STANDARD, UNDER THE DOUBLE JEOPARDY CLAUSE.

In the instant case, the Pennsylvania court held:

> . . . [W]e do not think the necessity for the trial judge's action is clearly manifest such that the propriety of the declaration of the mistrial is free from doubt.
> (5a)

There is absolutely no support in the law for the conclusion by the lower court that in the hindsight

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14/ It is noteworthy that the Common Pleas Court rejected this argument on the basis of the Fifth Circuit's erroneous holding in the Dinitz case. (20a)

of appellate wisdom, "manifest necessity" must be established beyond all doubt. On the contrary, this Court has held that:

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. Simmons v. United States, 142 U.S. 148, 12 S.Ct. 171, 35 L.ed. 968; Logan v. United States, 144 U.S. 263, 12 S.Ct. 28, 32-33 47 L.ed. 79. It is also clear that "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be served. . .," Brock v. United States, 344 U.S. 424, 427 73 S.Ct. 349, 350 97 L.ed. 456, and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion. See Lovato v. State of New Mexico, 242 U.S. 199, 37 S.Ct. 107, 61 L.ed. 244; Wade v. Hunter, [336 U.S. 684, 69 S.Ct. 834]. (Emphasis supplied) (footnotes omitted)

Gori v. United States, supra, 367 U.S. at 368.

It is submitted that in adopting the "free from doubt" standard, the Pennsylvania court has thoroughly emasculated the notion of "broad discretion reserved to the trial judge". Illinois v. Somerville, supra at 462.

Moreover, the Pennsylvania court held that:

> The trial court could have at least tried to contact both attorneys involved in the case to ascertain if they had any suggestions . . . . Even though the same

> decision may have resulted and even though the same decision may have been upheld as manifestly necessary had the attempt bee made, the failure to make any attempt to contact counsel creates a doubt as to the propriety of the exercise of discretion because it does not indicate a consideration of Walton's interest was made. (5a-6a) (footnotes omitted) (emphasis supplied)

The court thus created a rule that failure to consult with counsel indicates as a matter of law that the defendant's interests were not considered by the trial court and thus the double jeopardy clause bars retrial. Such a rule is flatly inconsistent with Gori v. United States, supra, wherein this Court found, "[W]hat is unquestionable is that the order [directing a mistrial] was the product of the trial judge's extreme solicitude -- an overeager solicitude it may be -- in favor of the accused." Id. at 367. In Gori the trial judge declared the mistrial without forewarning or consulting either counsel. (Moreover, in Gori, both counsel and the defendant were present in the courtroom and could easily have been consulted. Here, the trial court was forced to make a decision in the face of a late-night emergency. Even had he been able to reach defense counsel, there was insufficient time for the attorney to consult respondent in jail.

Moreover, in applying this rule, the Pennsylvania court erroneously ignored the totality of the circumstances. Instead of considering the implications of the

entire chain of events leading to the declaration of a mistrial and the resultant legal difficulties, it viewed the discharge of the third juror as though it had occurred in a vacuum.15/

As pointed out by the dissenting Justices, certain facts surrounding the discharge of the first and second jurors to be excused are pertinent. (7a). The third juror was discharged because of an urgent situation regarding the care of her two young children. The second juror to be excused was discharged because of an urgent situation which concerned the care of his aged parents.

15/ The court cavalierly disposed of the chain of events leading up to the mistrial as follows:

> The Commonwealth argues that the newspaper articles caused the mistrial and that, viewed as a whole, the series of determinations by the trial judge were designed to avoid a mistrial and that he declared a mistrial because his other attempts to avoid it failed and therefore, viewed in this light, the mistrial had become absolutely necessary since all other reasonable alternatives to avoid a mistrial had been pursued. We fail to see how the previous determinations made by the trial judge can remove the taint of an improper exercise of discretion at the time the juror was dismissed under the instant facts.

(6a, n.4). One is compelled to the conclusion that in reviewing the case of a sunken ship, that court would hold that the damage was not the fault of the torpedo which struck the hull, but of the Captain who didn't bail fast enough.

(68a-82a). At that time, the Assistant District Attorney suggested that the juror be sent home with a court officer or sheriff to accompany him. (78a). The court replied, "I have made my decision. I am going to excuse him because I want him to concentrate on this case. I do not want to separate the jury. The risks are too great in a situation like that." (79a).

These portions of the record establish that: (1) the judge had decided that the risk that the jurors might see the Daily News article if they were not sequestered was too great; (2) it was the judge's opinion that a juror who was having urgent problems at home such as children (or aged parents) who needed care would not be able to concentrate properly on the events occurring in the courtroom and should be excused; and, (3) the judge had concluded that having a juror accompanied to his or her home with a court officer or other official was not an acceptable solution to the problem. Thus, it is fair to assume from the record, (as did the dissenting Justices), that when faced with the problem posed by the need of the third juror to return home at midnight to care for her children, the judge was well aware that counsel for the parties would suggest alternatives already rejected by him: that sequestration be lifted or that the juror be accompanied home with a court officer.[16/]

16/ The record also establishes that neither attorney had anything further to suggest on the following morning.

In making these decisions, the judge was primarily motivated by the interest of the defendant in being tried by a fair and impartial jury, one that had not been exposed to prejudicial newspaper articles and was not anxious about personal problems outside the courtroom which would interfere with their concentration. It has long been settled that the manifest necessity standard is satisfied where jurors are excused because the trial court determines that they could not fairly consider the case. Simmons v. United States, 142 U.S. 148 (1891).

It may also be argued that reprosecution is permissible under the doctrine of Gori v. United States, supra, that the Court will not look behind a mistrial granted in the sole interest of the defendant. It is suggested that in discharging the jurors the trial judge was motivated solely by the defendant's interests in a fair jury as outlined above. While Judge Kubacki appropriately responded to the personal difficulties faced by the individual jurors, these problems could have been resolved by lifting the sequestration order. This Judge Kubacki refused to do because of his concern that the jury remain impartial and undistracted.17/

17/ Not only do the facts of the instant case show that the trial judge was motivated by the interest of the defendant, but the record clearly establishes that the District Attorney was free from fault and, in fact, consistently opposed the declaration of a mistrial and made every effort to suggest ways in which the trial could continue.

Finally, the court below refused to consider whether the mistrial declaration was appropriate in light of, "the public's interest in fair trial designed to end in just judgments", Illinois v. Somerville, supra at 463, quoting from Wade v. Hunter, supra. The Pennsylvania court summarily rejected this standard as follows:

> We need not examine the events and circumstances surrounding the declaration of the mistrial in relation to the "ends of justice." United States v. Perez, supra 22 U.S. at 580. "The ends of public justice" or, more precisely, "'the public's interest in fair trials designed to end in just judgments'", Illinois v. Somerville, supra 410 U.S. at 463, 93 S.Ct. at 1070, quoting from Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974, is a consideration which is made wherein a prejudicial element is injected or discovered at trial, such that, a mistrial serves to eliminate the prejudicial element and foster a just judgment. See generally, Commonwealth v. Robson, ___Pa.___, 337 A.2d 573 (1975); Commonwealth v. Stewart, supra; Commonwealth v. Shaffer, supra. This case does not involve the injection or discovery of a prejudicial element.

(6a at n.5). The error in the Pennsylvania court's analysis becomes at once apparent when one considers that none of the federal cases cited (Perez, Somerville and Hunter) involved injection of any "prejudicial elements." Moreover, the Pennsylvania court's finding that no such element existed in this case was clearly erroneous. Certainly the appearance of the Daily News Article on December 3, 1974, constituted just such a "prejudicial element". It was in fact this article which was the pivotal event which eventually caused the declaration of

the mistrial in the instant case. Had three of the jurors seen this article there is no doubt that a mistrial would have been required and reprosecution of respondent would not be barred.[18/] Illinois v. Somerville, supra; Simmons v. United States, supra; Commonwealth v. Pierce, 451 Pa. 190, 303 A.2d 209 (1973); Commonwealth v. Stewart, 456 Pa. 447, 317 A.2d 616 (1974). It was in attempting to avoid the necessity for a mistrial based on that ground that the court ran into the problem of the diminishing number of jurors who could remain in service. The trial judge determined that sequestration was necessary to prevent the jury's exposure to highly prejudicial publicity. Three of the jurors asked to be excused because compelling personal obligations made their sequestration burdensome (if not hazardous) to their families. The judge further determined that to force these jurors to remain isolated from their families who needed them would prevent their giving their full attention to the case. It is certainly not unreasonable for a judge to require that, in a case involving the execution of four persons, the jury be comprised of persons able to pay attention to the evidence undistracted by serious personal concerns. Since the "interests of public justice" would require a jury that was impartial and able to concentrate on the case, the

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18/ Indeed, when the first article appeared, defense counsel moved for a mistrial, then withdrew the motion.

trial court committed no abuse of discretion in determining that the inability of the twelfth juror to remain sequestered necessitated a mistrial. Moreover, having reached this conclusion after listening to the suggestions of both counsel and weighing all the relevant circumstances, the trial court committed no abuse of discretion. United States v. Jorn, 400 U.S. 470 (1971).

In summary, the Pennsylvania court misconstrued virtually all of the applicable guidelines handed down by this Court in barring retrial in the instant case. In so doing, it has placed a more restrictive interpretation on the double jeopardy clause of the Fifth Amendment of the United States Constitution than has this Court. This it has no power to do. Oregon v. Haas, 420 U.S. 714 (1975).

CONCLUSION

It is therefore respectfully submitted that a Writ of Certiorari should issue to review the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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